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No. 82-639

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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BOARD OF EDUCATION,
CITY SCHOOL DISTRICT, ROCHESTER, NEW YORK, ET AL.,
*Appellants,*

v.

EWALD B. NYQUIST,
COMMISSIONER OF EDUCATION, ET AL.,
*Appellees.*

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**On Appeal from the Court of Appeals of New York**

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## OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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In its gross overreading of *Rodriguez*, defendants' motion to dismiss or affirm entirely fails to answer the severe schooling disadvantages that New York's arbitrarily reduced aid for big city schooling imposes upon the vast majority of the state's poor and minority children. Defendants would tar plaintiffs and city plaintiffs with the same *Rodriguez* brush, but their situations are materially different. *Rodriguez* declined to require a state fully to offset a school district's poverty of taxable resources—rationality was found in the state's interest in local control of education. *Rodriguez* did not at all deal with a statute under which the state itself gives reduced and below average aid to distressed city schools and children because of its failure to consider debilitating urban factors—higher inexorable costs for non-education

services, higher costs of teachers and other resources, higher absenteeism rates that mean greater outlays, and immense concentrations of educationally disadvantaged and handicapped children. It was one thing for the state in *Rodriguez* to fail to redress a locality's shortage of school resources; it is quite another for the state itself to impoverish those resources by short-changing city districts on their share of education aid. No interest in local control or any other cogent interest has here been stated to excuse New York's disfavored treatment of the school systems that must educate the great majority of the state's poor and racial minority children. Such systematic impoverishment of education for the poor and needy is not what *Rodriguez* anywhere approved, but rather what it expressly reserved for a case presenting that issue; this is that case.

Evidencing defendants' own doubts about the applicability here of *Rodriguez*, they press avoidance arguments —challenging city plaintiffs' standing and questioning whether the existing discriminatory formula can be remedied—arguments which require but brief response. Alleging that the city plaintiffs "are school districts, not individuals with Fourteenth Amendment rights" (Mot. 19), defendants are nevertheless forced to acknowledge that the city plaintiffs include city school children, but they complain that "not one iota of evidence about any of them was introduced" (Mot. 23). To the contrary, dozens of urban witnesses, including teachers, principals, social workers and parents, presented voluminous evidence demonstrating the injurious deprivations caused the city plaintiff children by the state's inferior aid to city schools. An eight month trial focused precisely on the schooling deprivations to which plaintiffs and other school children are subjected, and there is simply no basis for defendants' claim that school children are not real parties seeking relief in this case.

Defendants alternatively argue that children in New York's big cities suffer no denial of equal protection be-

cause their schools meet the Regents' minimum requirements (Mot. 6, 17). This argument hardly answers the affirmed findings that, due to restricted school resources, masses of disadvantaged city children underachieve and thousands lack meaningful opportunity to attain even minimal educational skills. As the Appellate Division concluded, under the state school finance scheme, in the cities "large numbers of children emerge from the school system lacking even the minimal tools necessary to function in society" (A68-69). Particularly in view of this Court's ruling in *Plyler* v. *Doe*, —— U.S. ——, 102 S.Ct. 2382 (1982), the Regents' failure to set standards high enough to permit remediation of severe learning failures in the city schools cannot excuse the unequal support by the state to the distressed city school systems most in need of aid but receiving only reduced and below average state payments.[1]

Defendants also misrepresent the city plaintiffs' complaint that the state yields cities reduced aid for disadvantaged children. We do not merely assert (Mot. 14) "that per-pupil aids for handicapped and disadvantaged students are not sufficient to compensate the cities for their concentrations of those students." Rather, the city plaintiffs complain of the arbitrary *inferiority* in state school aid to city districts for such pupils, who are massed in the city schools (see J.S. 12-13). City school populations are the most difficult and expensive to educate, and yet the state provides them fewer resources than most of its other children.[2]

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[1] Defendants allege (without citation) that the big cities do not "direct proportionally more of their resources to their poor, disadvantaged, Black or Hispanic students" (Mot. 24). However, the New York courts found to the contrary that "the cities concentrate resources on pupils with special needs" (A51).

[2] Defendants compound their misrepresentation by grossly overstating the amount of state aid for educating these and other special need children. They allege, for example, that an additional

Finally, defendants complain that plaintiffs have not defined to the courts a specific remedy for the statute's inferior aid to city schools and pupils (Mot. 24-25). But it is the legislature's prerogative to propose remedies in the first instance if courts find an existing law unequal. In any event, upon the trial court's holding in 1978 that the current system is unconstitutional, the Governor appointed a Task Force of public officials, business and labor leaders, educators and other citizens, which issued a three volume report based on extensive research and statewide analysis (App. B to the Brief for City Plaintiffs in the New York Court of Appeals). The report presented a number of constitutionally acceptable and fiscally sound corrections of the statute to provide equity for the children in the city schools. But the legislature has felt free to disregard the equalization proposals of the Task Force in the absence of a final judicial decree requiring reform.

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$471.25 is "guaranteed" for each disadvantaged pupil, which "reimburses for concentrations of disadvantaged students" (Mot. 9), and further that school districts are "reimbursed for their actual expenses over the operating aid ceiling" in educating handicapped children (Mot. 9-10). There is no such reimbursement, and what the state actually provides for educating these children is only a formula fraction of a "guaranteed" amount (e.g., $199 per disadvantaged elementary school child in Rochester, A189), with the local school district paying the remainder (see the findings of fact, A189-94, 216-19).

Defendants also allege that students in New York's poorest district have more money spent on their education than the average pupil in virtually any other state (Mot. 5). Maldistribution of school funds cannot in any event be justified by a high overall level of spending, but defendants' statements about Salmon River in fact contradict the evidence they cite. The only per pupil expenditure figure for Salmon River that appears in the record (JA 6771) is lower than the average per pupil expenditure in 30 other states, according to defendants' own appendix.

Beyond defendants' unpersuasive avoidance arguments, the faulty central premise of their motion is that it leaves no meaningful assurance of equal protection applicable to a state's public education statute, even when it provides reduced support and inferior education to the great majority of the state's poor and minority children who are the most educationally needy. Defendants' plea for a judicial abstention rule so broad as to nullify equal protection in public education even for those who most require equal treatment fails for two conclusive reasons. *First*, public education deserves more than minimal equal protection status, for throughout our national history education has been uniquely recognized as the single most important function of the state, fundamental to the very operation of our democratic system of government and the best hope of the poor for equal opportunity in society. See *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923); *Wisconsin* v. *Yoder*, 406 U.S. 205, 221 (1972); *Ambach* v. *Norwick*, 441 U.S. 68, 76 (1979). *Second*, even if education were denied a heightened standard of judicial review, there is no rational basis anywhere suggested for the disfavored treatment that the New York aid law accords to most of the state's poorest and most educationally disadvantaged children. Treating as wealthy and less deserving of aid the educationally impoverished city school districts is irrationality above and beyond anything contemplated in *Rodriguez*.

1. In recognition of the fundamental importance of schooling to the operation of our system of popular government, which depends on an informed and literate electorate, the right to public education was incorporated in the earliest state charters and—unlike other public functions—today is uniquely guaranteed by virtually every state constitution. As early as 1797, George Washington called attention to the crucial importance of "institutions for the general diffusion of knowledge," counseling that

"in proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened." J. C. Fitzpatrick, ed., 35 *The Writings of George Washington* 230 (1940). Jefferson, too, stressed the importance of public education to a democratic society, warning that "if a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be." P.L. Ford, ed., 10 *The Writings of Thomas Jefferson* 4 (1899). Similarly, the earliest state constitutions bespoke the fundamental importance of public education. Thus in 1780 Massachusetts' constitution recognized public education as a legislative duty "necessary for the preservation of [the people's] rights and liberties" (Ch. V, 1780). Throughout the 19th century state after state made express constitutional provision for public schooling, frequently articulating its necessity for our democratic political system.[3] New York, in requiring education for "all the children of this State" (Const. 1895, Art. IX), similarly underscored the consensus that "the first great duty of the State is to protect and foster its educational interests." 1894 N.Y. Convention Doc. No. 62, at 2-3.

The guarantee of universal public education has served an additional vital public purpose in assuring a more equal opportunity for the poor to advance in society. As early as 1790, Pennsylvania's constitution required that public schools be established "in such manner that the poor may be taught gratis" (Art. VII). The Indiana Constitution of 1816 required "a general system of education . . . wherein tuition shall be gratis, and equally open to all" (Art. IX). The egalitarian purpose of public education found similar expression in the 1812 Report of the New York Commission on Common Schools, which

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[3] See, e.g., N.H. Const., Sec. LXXXIII (1792); Ms. Const., Art. VI (1817); Me. Const., Art. VIII (1819); Tn. Const., Art. XI (1834); N.C. Const., Art. IX (1876).

led to the establishment of "a system of common schools . . . to bring instruction within the reach and means of the humblest citizen." C. Z. Lincoln, 2 *Messages from the Governors* 724 (1906). The 19th century common school movement led by Horace Mann promoted universal free education as the "great equalizer of the condition of men," which "prevents being poor." L.A. Cremin, ed., *The Republic and the School* 85-87 (1957). And that egalitarian duty of the state to accord "the same opportunities for education . . . to all children alike" was a central principle reflected in early 20th century school finance reforms. *Public Papers of Governor Alfred E. Smith* 70 (1923).[4]

In sum, as the underpinning of effective democratic self-government and the safeguard against a permanent poverty class, public education has long been made the unique duty owed by the state to all its children. Surely more than minimal equal protection scrutiny is due a right which has been so universally recognized as the signal duty of the state to foster and provide. If there is any public system to whose inequalities meaningful constitutional review should apply, particularly when it disadvantages the poor, it is certainly the fundamental system which has been seen from the beginning as the promise to the poor of a more equal chance in society. The application of the most minimal review standard by the court below to a right of such paramount public importance calls for this Court's plenary consideration.

2. Even if no heightened review were to be accorded to the unequal school support statute before the Court, defendants are in error in urging that, even without a manifest justifying basis, *Rodriguez* here validates in-

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[4] A comprehensive historical study, covering nearly two centuries and documenting the primacy of these egalitarian themes, was filed in the Court of Appeals as Appendix D to the Brief for City Plaintiffs.

ferior state support to hard-pressed cities unable to provide schooling to meet the acute needs of their many educationally disadvantaged children. Thus, the trial court found that under the state aid law's "less favorable treatment of unequals" (A308), in the cities "Many disadvantaged pupils received not compensatory education and enrichment, but lesser resources than pupils elsewhere because class size and pupil-staff ratios in the cities are among the largest in the State, while facilities and support services are among the most constricted" (A202); the result found by the court is that "thousands of students in the big city school districts fail to achieve even basic minimal skills" (A226-30). The Appellate Division similarly concluded that as concerns the cities the statute "fails to give fair and adequate consideration to their special and severe educational overburdens" (A94) so that "unconscionable numbers of children fail to acquire basic educational skills" (A50). And even the Court of Appeals recognized that "the four major cities represented by the intervenors . . . are forced to provide instructional services and facilities of a lesser quantity, variety, and quality," and conceded the existence of "great and disabling and handicapping disparities in educational opportunities across our State, centered particularly in our metropolitan areas . . ." (A12, 23).

When such severe schooling deprivations flow from the state's mismeasurement of both urban school funding capacities and needs (see J.S. 7-13), a cogent rational basis is plainly required to justify so injurious a result. In striking down a statute far less consequential than a law that malapportions funds for the education of children, this Court has recently required in its *Zobel* ruling a cogent rational basis for differing state financial payments. Surely no less is required to justify unequal state support here than was required in *Zobel* to justify disparate financial payments to the state's citizens. Yet the lower courts' detailed findings that there is no rational

basis for the statute's multiple mismeasurements of city aid entitlement remain wholly unanswered in the ruling below, which offers no tangible justification for the state's inferior treatment of the vast majority of its poor and minority children.[5]

In sum, the absence of a rational basis clearly distinguishes this case from *Rodriguez*, which defendants mistakenly read as authorizing a state's inferior school support to its most educationally needy children. Dissenting Judge Fuchsberg emphasized below that, unlike the present case, in *Rodriguez* "there was no claim that the statute malapportioned State school aid by mismeasuring the funding capacities and needs of city districts" (A33). Actually, the present case presents the question expressly reserved in *Rodriguez*, concerning a school system that works to "the peculiar disadvantage" of the poor (411 U.S. 1, 26). The unjustified reduction of support by

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[5] Like the ruling below, defendants' motion remains mute concerning three of the four major mismeasurements of the cities' school aid entitlement under the existing statute—disregard of their higher school costs, the penalty for costly student absenteeism by a daily attendance measure of aid, and the inferior support for their disadvantaged and handicapped pupils. And as concerns municipal overburden, defendants are in error in suggesting (Mot. 15-16, 24) that city plaintiffs ask the courts to determine whether a city's budget is "fairly divided" among different spending categories or whether school spending is given the "lowest priority". The central flaw found by the lower courts is that the New York legislature has decided to provide greater "equalizing" aid for districts with lesser school funding capacity but has failed to measure the cities' capacity in a realistic way. It bears repetition that the New York courts found that the population and physical characteristics of the cities prevent them from drawing on their tax base for school funding to the same extent as other jurisdictions. Yet instead of taking account of this reality New York's "equalizing" aid statute exacerbates the cities' disadvantage, by defining a district's local school financing capacity solely in terms of a property and income tax base per child most of which is unavailable for education funding (see our J.S. 8-10).

New York to its city school systems, injuring those of the state's children who most deserve rigorous equality and constitutional protection, presents a vital issue that calls for this Court's plenary review.

Respectfully submitted,

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